

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF ELECTRICITY

In the Matter of the Proposed Rules of
the Board of Electricity Governing
Electrical Licensing and Training;
Minnesota Rules, Chapter 3800

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Barbara L. Neilson conducted a hearing in this rulemaking proceeding commencing at 9:30 a.m. on February 17, 2009, in the Minnesota Room, Department of Labor and Industry, 443 Lafayette Road North, St. Paul, Minnesota. The hearing continued until everyone present had an opportunity to state his or her views on the rules being proposed by the Board of Electricity (Board).

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in the rules' being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

There were four members on the Board's hearing panel: Wendy Willson Legge, Construction Codes and Licensing Attorney for the Department of Labor and Industry and Attorney for the Board; James Freichels, Board Chairman; John Schultz, Assistant Director of the Construction Codes and Licensing Division in the Department of Labor and Industry; and Annette Trnka, Board staff member. Thirty-seven people signed the hearing register.

The Board and the Administrative Law Judge received written comments on the proposed rules prior to the hearing. After the hearing, the Administrative Law Judge kept the administrative record open for an additional twenty calendar days, until March 9, 2009, to allow interested persons and the Board to submit written comments. The record remained open for an additional five business, until March 16, 2009, to allow interested persons and the Board to file a written response to any comments received during the initial comment period.² Numerous comments were received during the

¹ Minn. Stat. §§ 14.131 through 14.20.

² See Minn. Stat. § 14.15, subd. 1.

rulemaking process. The hearing record closed for all purposes on March 16, 2009. All of the comments received were read and considered.

NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before the Board takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Board, and the Board will notify those persons who requested to be informed of their filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Nature of the Proposed Rules

1. The Minnesota Electrical Act, which is codified in Minnesota Statutes §§ 326B.31 to 326B.399, governs the licensure and registration of individuals, employers and companies that perform electrical wiring. The prior Board of Electricity originally adopted Minnesota Rules, Chapter 3800, relating to these statutory requirements. In 2005, Governor Pawlenty transferred the prior Board's responsibilities to the Department of Labor and Industry. In 2007, the Legislature created a new Board of Electricity and gave the Board specific powers, including rulemaking authority in certain areas. The 2007 legislation stated that, except for the specific powers granted to the Board of Electricity, the Commissioner of Labor and Industry would be responsible for administering and enforcing the provisions of the Electrical Act and any rules promulgated under that Act.³ The 2007 legislation also created a requirement that unlicensed individuals who perform electrical work for a contractor or employer must register with the Department.⁴

2. In this rulemaking proceeding, the Board proposes to adopt amendments to the existing rules set forth in Chapter 3800 relating to licensing, registration, and continuing education requirements. Among other things, the proposed amendments add new definitions of "acceptable experience" and "registered unlicensed individual"; clarify the minimum experience and examination requirements for licensure; update statutory and agency references in the rules; outline procedures to be followed for unlicensed individuals to register with the Department; and require that registered

³ Statement of Need and Reasonableness (SONAR) at 1; Transcript of Public Hearing (Tr.) at 15-16; Minn. Stat. §§ 326B.02, subds. 1 and 5, and 326B.32, subd. 2.

⁴ See Minn. Stat. § 326B.33, subds. 12 and 13.

unlicensed individuals earn eight hours of continuing education credit as a condition of renewal of their registration. The proposed rule amendments modify the existing rules to reflect the separation of duties between the Board and the Department. In addition, technical changes are proposed to conform the terminology used in existing Chapter 3800 with that used in the Electrical Act.⁵

Rulemaking Legal Standards

3. Under Minnesota law, one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts.⁶ In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.⁷ The Board prepared a Statement of Need and Reasonableness (SONAR) in support of its proposed rules. At the hearing, the Board primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rules. The SONAR was supplemented by comments made by Board and Department staff at the public hearing, and by the Board's written post-hearing submissions.

4. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.⁸ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.⁹ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.¹⁰ The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."¹¹

5. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.¹²

6. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Board complied with the rule adoption procedure,

⁵ SONAR at 1.

⁶ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

⁷ *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁸ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

⁹ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

¹⁰ *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

¹¹ *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

¹² *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

whether the rule grants undue discretion, whether the Board has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.¹³

7. Because the Board suggested changes to the proposed rules after original publication of the rule language in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if: the differences are within the scope of the matter announced in the notice of hearing and are in character with the issues raised in that notice; the differences are a logical outgrowth of the contents of the notice of hearing, and the comments submitted in response to the notice; and the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.¹⁴

8. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether persons who will be affected by the rule should have understood that the rulemaking proceeding could affect their interests; whether the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of hearing; and whether the effects of the rule differ from the effects of the proposed rule contained in the notice of hearing.¹⁵

Procedural Requirements of Chapter 14

9. The Minnesota Administrative Procedures Act¹⁶ and the rules of the Office of Administrative Hearings¹⁷ set forth certain procedural requirements that are to be followed during agency rulemaking.

10. On February 25, 2008, the Board published in the State Register a Request for Comments on Possible Amendment to Rules Governing Electrical Licensing, Registration of Unlicensed Workers, and Continuing Education, Minnesota Rules, Chapter 3800.¹⁸

11. As required by Minn. Stat. § 14.131, the Board asked the Commissioner of Finance to evaluate the fiscal impact and benefit of the proposed rules on local units of government. The Department of Finance provided comments in a memorandum dated October 27, 2008.¹⁹

¹³ Minn. R. 1400.2100.

¹⁴ Minn. Stat. §14.05, subd. 2(b).

¹⁵ Minn. Stat. § 14.05, subd. 2(c).

¹⁶ The provisions of the Act relating to agency rulemaking are codified in Minn. Stat. §§ 14.001-14.47.

¹⁷ The OAH rules governing rulemaking proceedings are set forth in Minnesota Rules part 1400.2000 through 1400.2240.

¹⁸ Ex. 1.

¹⁹ Ex. 12.

12. On November 18, 2008, Chief Administrative Law Judge Raymond R. Krause authorized the Board to omit the text of its proposed rules from publication in the State Register pursuant to Minn. Stat. § 14.22, subd. 1(b).²⁰

13. On November 26, 2008, the Board filed copies of the proposed Dual Notice of Hearing, proposed rules, and draft Statement of Need and Reasonableness (SONAR) with the Office of Administrative Hearings. The Dual Notice indicated that, if the Department received 25 or more requests for a hearing, the hearing would occur on February 17, 2009. The filings complied with Minn. R. 1400.2080, subp. 5. By letter dated December 5, 2008, the Administrative Law Judge approved the Dual Notice.

14. On December 18, 2008, the Board electronically mailed the Dual Notice to all persons on its interested parties and board member electronic mailing list.²¹

15. On December 19, 2008, the Board mailed the Dual Notice to all persons on its Rulemaking List and Additional Notice Plan mailing list.²²

16. On December 22, 2008, the Board published the Dual Notice in the State Register.²³

17. The Board received requests for a hearing from 176 people, and the hearing on the proposed rule was held on 9:30 a.m. on February 17, 2009, at the Department of Labor and Industry in St. Paul, Minnesota.²⁴

18. At the hearing, the Board placed the following documents in the record:

A. the Request for Comments as published in the State Register on February 25, 2008 (32 SR 1638);²⁵

B. a copy of the proposed rules dated October 20, 2008, including the Revisor's approval;²⁶

C. a copy of a memorandum from Ryan Baumtrog, Executive Budget Officer for Minnesota Management & Budget regarding the fiscal impacts and benefits of the proposed rules with respect to local governments;²⁷

D. a copy of the SONAR;²⁸

E. a copy of the transmittal letter showing that the Board mailed a copy of the SONAR to the Legislative Reference Library on December 10, 2008;²⁹

²⁰ Ex. 5.

²¹ Ex. 11.

²² Exs. 9-10.

²³ Ex. 6.

²⁴ Exs. 15-22.

²⁵ Ex. 1.

²⁶ Ex. 2.

²⁷ Ex. 12.

²⁸ Ex. 3.

- F. a letter from Chief Administrative Law Judge Raymond R. Krause authorizing omission of the text of the proposed rule from the published dual notice;³⁰
- G. the Dual Notice as mailed and published in the State Register on December 22, 2008 (33 SR 1101);³¹
- H. a Certificate of Accuracy of the Rulemaking Mailing List as of December 8, 2008;³²
- I. a Certificate that the Dual Notice and the SONAR were mailed to certain members of the Legislature on December 10, 2008;³³
- J. Certificates reflecting that the dual notice was mailed to the Rulemaking Mailing List and the Additional Notice List on December 19, 2008, and was emailed to interested parties and Board members on December 18, 2008;³⁴
- K. a copy of the Notice of Hearing that was sent on February 10, 2009, to those who requested a hearing, with attached service list;³⁵
- L. copies of comments and hearing requests received from members of the public during the comment period;³⁶
- M. copies of comments and hearing requests received from members of the public after the comment period ended but before the public hearing;³⁷
- N. a description of an audit by the Department in January and February of 2009 of satellite antenna system installations and 22 pages of photographs taken during the audit;³⁸
- O. a copy of the Department's Electrical License Examination Guide;³⁹ and
- P. a copy of the Matrix of Individual Electrical Licensing or Registration Requirements and Inspection Requirements for the Installation of Technology Systems by Employees of Licensed

²⁹ Ex. 4.

³⁰ Ex. 5.

³¹ Exs. 6, 7.

³² Ex. 8.

³³ Ex. 13.

³⁴ Exs. 9-11.

³⁵ Ex. 14.

³⁶ Exs. 15-22.

³⁷ Exs. 23-24, 28.

³⁸ Ex. 25.

³⁹ Ex. 26.

Electrical Contractors, Technology System Contractors or Employers.⁴⁰

19. The Administrative Law Judge finds that the Board has met all of the procedural requirements under applicable law and rules.

Additional Notice

20. Minn. Stat. §§ 14.131 and 14.23 require that the SONAR contain a description of the Board's efforts to provide additional notice to persons who may be affected by the proposed rules. The Board submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated December 5, 2008. In addition to notifying persons on the rulemaking mailing list maintained by the Board of Electricity and Department of Labor and Industry, the Board represented that it would mail or email the Dual Notice to numerous organizations and trade associations involved in electrical and building construction, as well as technical colleges and continuing education providers. During the rulemaking hearing, the Board introduced evidence that certified the provision of notice to those on the rulemaking list maintained by the Board and in accordance with its additional notice plan.⁴¹

21. The Board took action to inform the following interested and affected parties and associations of this rulemaking process: Associated Builders and Contractors; National Electrical Contractors Association; Minnesota Electrical Association; certain local chapters of the International Brotherhood of Electrical Contractors; local chapter of the Association of Minnesota Building Officials; National Association of Elevator Safety Authorities; Minnesota Mechanical Contractors Association; Association of General Contractors of Minnesota; Minnesota Utility Contractors Association; Minnesota chapter of the International Association of Electrical Inspectors; Contract Electrical Inspector Association; Communication, Control, Alarm, Remote, Signaling Association; Minnesota Municipal Utilities Association; Minnesota Electronic Security and Technology Association; Builders Association of Minnesota; Builders Association of the Twin Cities; Minnesota State Fire Chiefs Association; Minnesota Plumbing, Heating and Cooling Contractors Association; American Society of Plumbing Engineers – Minnesota Chapter; American Society of Civil Engineers - Minnesota Section; Association of Minnesota Counties; Building Owners and Managers/St. Paul; League of Minnesota Cities; American Council of Engineering Companies of Minnesota; Minnesota Pipe Trades Association; Minnesota State Fire Marshal Division; Minnesota Association of Townships; North Central Electrical League; Metropolitan Council; Minnesota Landscapers Association; all approved continuing education providers for electrical licensing, as listed on the Department's website; all MNSCU technical colleges that administer electrical programs; and others who specifically requested notice.⁴²

22. Copies of the proposed rules, SONAR, and Dual Notice were also posted on the Board's webpage on the Board's website.

⁴⁰ Ex. 27.

⁴¹ Exs. 8-11.

⁴² SONAR at 5-6.

23. The Administrative Law Judge finds that the Department has fulfilled its additional notice requirement.

Statutory Authority

24. As discussed above, the Legislature has divided the rulemaking authority with respect to electrical work between the Commissioner of Labor and Industry and the Board of Electricity. Chapter 326B of Minnesota Statutes gives general rulemaking authority to the Commissioner of Labor and Industry except where the rulemaking authority is expressly transferred to the Board.⁴³ In this instance, the Board and the Department of Labor and Industry agree that the proposed rules are within the rulemaking authority of the Board, not the Department.⁴⁴

25. In its SONAR, the Board asserts that its statutory authority to adopt rules related to licensing, registration, and continuing education is set forth in Minn. Stat. § 326B.32, subd. 2(a)(5) and (6).⁴⁵ Those provisions state in relevant part that the Board has the power to:

(5) adopt rules that regulate the licensure *or registration* of electrical businesses, electrical contractors, master electricians, journeyman electricians, Class A installer, Class B installer, power limited technicians, and other persons who perform electrical work except for those individuals licensed under section 326.02, subdivisions 2 and 3. The board shall adopt these rules pursuant to chapter 14 and as provided in subdivision 6, paragraphs (d) and (e); [and]

(6) adopt rules that regulate continuing education for individuals licensed *or registered* as electrical businesses, electrical contractors, master electricians, journeyman electricians, Class A installer, Class B installer, power limited technicians, and other persons who perform electrical work. The board shall adopt these rules pursuant to chapter 14 and as provided in subdivision 6, paragraphs (d) and (e)⁴⁶

26. Minn. Stat. § 14.125 sets certain time limits on the exercise of rulemaking authority:

An agency shall publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted, amended, or repealed. If the notice is not published within the time limit imposed by this section, the authority for the rules expires. The agency shall not use other law in existence at the time of the expiration of rulemaking authority under this section as authority to adopt, amend, or repeal these rules.

⁴³ Minn. Stat. § 326B.02, subds. 1 and 5.

⁴⁴ Tr. at 17.

⁴⁵ SONAR at 2.

⁴⁶ Minn. Stat. § 326B.32, subd. 2(a)(5) and (6) (emphasis added).

An agency that publishes a notice of intent to adopt rules or a notice of hearing within the time limit specified in this section may subsequently amend or repeal the rules without additional legislative authorization.

27. The Board asserts that its rulemaking authority under § 326B.32 has not expired, for several reasons. First, the Board argues that the proposed rules are amendments of rules adopted by the previous Board of Electricity, and therefore § 14.125 does not apply. Second, the Board contends that § 14.125 does not apply because the rulemaking authority in Minn. Stat. § 326B.32 is not new rulemaking authority, but is instead a transfer of certain rulemaking authority from the previous Board of Electricity to the current Board. It points out that the previous Board's rulemaking authority under Minn. Stat. § 326.241 (2006) was repealed when Minn. Stat. § 326.2415 (later renumbered § 326B.32) was enacted on July 1, 2007. Finally, even if Minn. Stat. § 14.125 applies, the Board argues that its statutory authority has not expired because it published the Dual Notice of Hearing less than 18 months after the effective date of Minn. Stat. § 326B.32.⁴⁷

28. The Board published the Dual Notice of Hearing on the proposed rules in the State Register on December 22, 2008.⁴⁸ Minn. Stat. § 326B.32, which granted the new Board certain rulemaking authority, became effective on July 1, 2007.⁴⁹ Because the Dual Notice was issued less than 18 months after the effective date of 326B.32, the Administrative Law Judge finds that the Board's rulemaking authority has not expired under Minn. Stat. § 14.125. There is no need to address the other arguments made by the Board.

29. The Administrative Law Judge concludes that the Board has general statutory authority under Minn. Stat. § 326B.32, subd. 2(a)(5) and (6), to adopt rules relating to registration of certain unlicensed persons who perform electrical work and continuing education requirements for registered persons, and that its exercise of rulemaking authority has not expired under Minn. Stat. § 14.125. Whether specific aspects of the proposed rules are consistent with the statute will be discussed in more detail below.

Impact on Farming Operations

30. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

31. There is no evidence that the proposed rules affect farming operations. Accordingly, the Administrative Law Judge concludes that the Board was not required to notify the Commissioner of Agriculture.

⁴⁷ SONAR at 2.

⁴⁸ 33 State Reg. 1101 (Dec. 22, 2008) (Ex. 6).

⁴⁹ See 2007 Minn. Laws, chapter 140, article 5, section 19 (adding Minn. Stat. § 326.2415), section 33 (repealing Minn. Stat. §§ 326.01, 326.241, and 326.247) and section 32 (renumbering 326.2415 as 326B.32).

Regulatory Analysis in the SONAR

32. Minn. Stat. § 14.131 requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

33. With respect to the first factor, in its SONAR the Board identified the class of persons who will be affected by the proposed rules as unlicensed individuals who perform or wish to perform electrical work, individuals who are licensed or plan to become licensed to perform electrical work, and electrical contractors.⁵⁰

34. With respect to the second requirement regarding the probable enforcement costs to the agency and any anticipated effect on state revenues, the Board indicated in its SONAR that it will not incur any costs associated with the adoption of the proposed rule because the Board has no administrative authority. The Board acknowledged that the Department will incur additional costs associated with administering the requirements for registration and registration renewal with respect to unlicensed individuals who perform electrical work. The Board stated that it anticipates that the annual registration fee of \$15 for unlicensed individuals established in Minn.

⁵⁰ SONAR at 3.

Stat. § 326B.33, subd. 19(b)(2), will offset the cost of administering the registration of unlicensed individuals.⁵¹

35. With respect to the third requirement, the Board must determine if there are less costly or less intrusive methods to achieve the purposes of the proposed rules. The Board stated in its SONAR that, “[b]ecause these rules are necessary to administer statutory requirements, no alternatives were considered.”⁵²

36. With respect to the fourth requirement, the Board must describe any alternative methods it considered and the reasons they were rejected. The Board states that it considered no other methods for achieving the purpose of the proposed rules.⁵³

37. With respect to the fifth requirement, the Board must note the probable cost of complying with the proposed rules. The Board asserts that unlicensed individuals will be required to register annually and obtain eight hours of continuing education as a condition of renewal of their annual registration. The statute sets the cost of the annual registration as \$15. The Board indicated that the cost of obtaining the continuing education varies. It stated that, in some cases, apprenticeship and other training programs would qualify for the continuing education credit and no additional costs would be incurred by the unlicensed individual. The Board further noted that, in other cases, membership in professional organizations would include opportunities to earn qualifying continuing education credits at no additional cost. The SONAR indicated that the Department sponsors training sessions that qualify for continuing education credits at a cost of \$50 for an 8-hour course, and other independent providers charged up to \$150 for an 8-hour course. Because continuing education is required for all of the electrical license categories, the Board stated that there are a significant number of continuing education providers, and an adequate number of courses should be available to enable unlicensed registered individuals to meet the requirement.⁵⁴

38. With respect to the sixth factor, the Board asserts that, if the proposed rule setting forth the requirement for continuing education for registered unlicensed individuals is not adopted, “the necessary knowledge for unlicensed individuals to adequately perform electrical work will not be assured.” The Board contends that “[a]dequate technical knowledge is critical to ensure that electrical wiring is installed in compliance with applicable safety standards” and that “[a]n adequately trained workforce results in the efficient installation of electrical wiring, resulting in overall cost savings to the general public.”⁵⁵

39. With respect to the seventh factor, the Board asserts that nothing in the proposed rule conflicts with federal regulations because there are no applicable federal regulations in this area.⁵⁶

⁵¹ SONAR at 3.

⁵² SONAR at 3.

⁵³ SONAR at 3.

⁵⁴ SONAR at 4; Testimony of John Schultz, Tr. at 36 (cost of Department-sponsored training increased to \$50 after SONAR published).

⁵⁵ SONAR at 4.

⁵⁶ SONAR at 4.

40. Some individuals and organizations opposing the proposed rules questioned whether the regulatory analysis in the SONAR was sufficient under Minn. Stat. § 14.131. For example, the Minnesota Cable Communications Association (MCAA) asserted that the Board failed to adequately describe the classes of persons who probably will be affected by the proposed rule because it failed to acknowledge the impact of the continuing education requirement on small and large Minnesota businesses that employ unlicensed registered individuals and choose to pay for employee training. MCAA stated that the Board ignored testimony from employers who want to provide necessary job training during an employee's paid working hours and failed to consider the loss of employee productivity that would be caused by the proposed requirement.⁵⁷ MCAA also argued that the Board failed to consider the impact of the proposed continuing education requirement in situations where "state-mandated training would render existing company-sponsored programs redundant."⁵⁸ Finally, MCAA maintained that the Board failed to consider whether the purpose of the rule – protecting public safety – could be achieved through greater enforcement efforts by the Department.⁵⁹

41. The Minnesota Nursery and Landscape Association (MNLA), which represents over 3,000 owners and operators of nursery and landscape businesses, also contended that the Board failed to address the significant costs the rule would impose on employers who pay for the credits, pay their workers to attend the courses, or experience the loss of workers who will not or cannot satisfy the education requirement.⁶⁰ MNLA further argued that the Board's analysis of the probable cost to implement and enforce the rule is inadequate. It disputed that the \$15 registration fee will offset administration costs, and argues that the Board's lack of analysis of the enforcement costs calls into question whether the rule will be effectively enforced, or whether the rule will burden only those who comply with the licensing rules.⁶¹ MNLA contended that the Board has not demonstrated that no less costly or intrusive methods for achieving the purpose of the rule exist, maintained that the Board failed to examine alternative methods for achieving the purpose of the proposed rule, and asserted that the Board should have to consider less burdensome means of encouraging voluntary participation in continuing education before it adopts this rule.⁶² Greg McDonald, President of Automatic Irrigation Inc., similarly stated that the Board ignored the cost to companies to educate individuals who in all likelihood will never pursue a career in an electrical field. He stated that the Board did not accurately assess the costs or prove that they are reasonable for small businesses.⁶³

42. In response to these comments, the Board emphasized that the proposed rule does not *require* employers to pay the cost of continuing education for registered unlicensed individuals, and it was reasonable for the Board to take the position that it was not necessary to include the cost of lost wages to businesses in its analysis.⁶⁴ The

⁵⁷ Comment, March 9, 2009 (Anthony Mendoza), citing Test. of Rick Keane, Tr. 18, 31; Paul Edgett, Tr. 80-82; Bob Fitch, Tr. 92, Ron Soukup, Tr. 113-115; *see also* Test. of J. Freichels, Tr. 67-70.

⁵⁸ Comment, March 9, 2009 (Anthony Mendoza) at 2-3.

⁵⁹ Comment, March 9, 2009 (Anthony Mendoza) at 9.

⁶⁰ Comment, March 9, 2009 (Thomas Radio) at 3-4; Test. of Bob Fitch, Tr. 91-96; Test. of Jeff Lattrell, Tr. 96-101; Test. of Gerry De La Vega, Tr. 101-113; Test. of Ron Soukup, Tr. 113-117.

⁶¹ Comment, March 9, 2009 (Thomas Radio) at 4-5.

⁶² Comment, March 9, 2009 (Thomas Radio) at 5-7.

⁶³ Comment, March 2, 2009.

⁶⁴ Board Rebuttal Comment, March 16, 2009 at 9-10.

Board asserted that it did not need to analyze whether enforcement of existing rules would be a less costly and less intrusive method for achieving the purpose of the proposed rule, because enforcement is clearly more costly than a continuing education requirement and enforcement is no substitute for prevention through education. The Board noted that the estimated cost of corrections required of the companies involved in the three investigations described by the Department during the rulemaking process was as high as \$750,000, not counting the additional costs associated with employee time expended in conducting and responding to the Departmental investigation.⁶⁵ The Board also maintained that enforcement costs “are impossible to estimate through reasonable effort. There is no way to know how many violations would occur, or how much it would cost to enforce those violations.” The Board pointed out that the SONAR is required to include certain specified information “to the extent the agency, through reasonable effort, can ascertain this information.”⁶⁶ The Board thus contended that the SONAR complied with Minn. Stat. § 14.131 and Minn. R. 1400.2070.⁶⁷

43. Although the analysis in the SONAR could have been more thorough, the Administrative Law Judge finds that the Board adequately considered the regulatory factors required by Minn. Stat. § 14.131. The Board further explained the basis for its regulatory analysis in comments by the agency panel at the rule hearing and in its post-hearing submissions. Because the continuing education requirement contained in the proposed rule does not require employers to bear the cost of continuing education for employees or mandate that employees must be permitted to attend courses during work hours, it was reasonable for the Board not to discuss such costs. Moreover, because some employers already provide in-house training to their unlicensed employees and the Board’s rules would permit employers to seek approval for such training programs, the costs associated with the proposed rules may be minimal for certain employers. While the Board could possibly have considered enforcement of existing requirements by the Department as an alternative to proposing the continuing education requirement, its analysis is not rendered inadequate by its failure to do so, particularly since it provided information about the much higher costs associated with enforcement at the hearing and in its written submissions.

Performance-Based Regulation

44. The Administrative Procedure Act also requires that an agency describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems set forth in Minn. Stat. § 14.002.⁶⁸ A performance-based rule is one that emphasizes superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁶⁹

45. In its SONAR, the Board indicated that the proposed rules implement performance-based standards to the extent practicable. The Board noted that the Electrical Act imposes licensure and registration requirements for individuals, employers and companies that perform electrical wiring and, with limited exceptions, requires

⁶⁵ Board Rebuttal Comment, March 16, 2009 at 10.

⁶⁶ Minn. Stat. § 14.131.

⁶⁷ Board Rebuttal Comment, March 16, 2009 at 10.

⁶⁸ Minn. Stat. § 14.131.

⁶⁹ Minn. Stat. § 14.002.

individuals who perform electrical work to either be licensed or registered. The Board also emphasized that the Electrical Act mandates that electrical wiring, apparatus and equipment for electric light, heat, and power, technology circuits or systems comply with the National Electrical Code (NEC) and the National Electrical Safety Code.⁷⁰ The Board indicated that it is proposing these amendments to Minn. Rules Chapter 3800 to meet the Electrical Act requirements and performance-based standards. The proposed amendments will ensure that individuals who perform electrical work have the necessary knowledge and expertise to perform electrical work that complies with the NEC and the National Electrical Safety Code. The proposed amendments also provide a method of experience verification for registered unlicensed individuals so that the Department can properly identify individuals who qualify to take a license examination. The Board concludes that the amendments therefore implement performance-based standards.⁷¹

46. MNLA and MCAA argued that the Board failed to demonstrate that the proposed rule emphasizes superior achievement of the Board's objectives and maximum flexibility for the regulated party, as required by Minn. Stat. § 14.002. MNLA asserted that the Board failed to articulate a specific and definitive purpose for the rule, and contended that the Board has not shown that unlicensed workers have committed safety violations or that they or Minnesota consumers have suffered any injuries or damage that could have been prevented through further education of unlicensed individuals. MCAA again argued that the Board should have considered whether greater enforcement of existing laws could alleviate the need for the proposed rules.⁷²

47. The Administrative Law Judge finds that the Board has met the requirements set forth in § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems. The Board has shown that the proposed rules implement state and national electrical codes which are performance-based, and provide for experience verification for individuals who ultimately wish to take an examination for licensure. The continuing education component of the proposed rules is designed to ensure that individuals who perform electrical work have the necessary knowledge to perform that work in compliance with applicable codes. The comments of MNLA, MCAA, and others regarding whether the Board has adequately demonstrated the need for and reasonableness of the proposed rules will be further discussed below.

Consultation with the Commissioner of Finance

48. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

49. As required, the Board consulted with the Commissioner of Finance. In a response dated October 27, 2008, Executive Budget Officer Ryan Baumtrog of

⁷⁰ Minn. Stat. § 326B.35.

⁷¹ SONAR at 4-5.

⁷² Comment, March 9, 2009 (Thomas Radio) at 10-12; Comment, March 9, 2009 (Anthony Mendoza) at 9; see also Testimony of Anthony Mendoza, Tr. 61-73, 76-79.

Minnesota Management and Budget concluded that the proposed rules “will not impose a significant cost on local governments.”⁷³

50. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for consulting with the Commissioner of Finance.

Compliance Costs for Small Businesses and Cities

51. Under Minn. Stat. § 14.127, the Board must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.

52. In the SONAR, the Board stated that it has determined that the cost of complying with the proposed rules in the first year after they take effect will not exceed \$25,000 for any small business or small city. The Board indicated that the costs associated with the proposed rule amendments will fall on the individuals who register as unlicensed persons, not small businesses or cities, since businesses and cities are not required to reimburse employees for these costs. Even if a small business or city chooses to reimburse costs for their employees who register as unlicensed individuals, and chooses to let their employees use work time to fulfill the continuing education requirements, the Board projected that the costs would not reach \$25,000 during the first year after the rules become effective. For example, if all 50 employees of a small business or city needed to be registered and take eight hours of continuing education and be paid while attending the course, the Board estimated that the total cost would be at most \$18,250 during the first year.⁷⁴

53. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.127, subd. 1, and approves its determination that costs of compliance for small businesses and cities will not exceed the costs threshold established by that statute.

Analysis of the Proposed Rules

54. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined; it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

⁷³ SONAR at 6; Ex. 12.

⁷⁴ SONAR at 6-7. In the SONAR, the Board provided the following break-down of its total cost projection: the cost of registering 50 employees would be \$750 (\$15 each), the maximum cost of continuing education would be \$7,500 (\$150 each), and the average cost for 50 employees for 8 hours of lost wages would be \$10,000 (\$200 each).

55. The most controversial aspect of the proposed rules is the requirement that registered unlicensed individuals must have eight hours of continuing education credit each year in order to renew their registration. Many individuals and organizations commenting on the proposed rules challenged the Board's authority to promulgate this rule, as well as the need for and reasonableness of the requirement. Accordingly, this Report will focus on that portion of the proposed rules.

56. The Administrative Law Judge finds that the Department has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Parts 3800.3525 and 3800.3602 of the Proposed Rules

57. As noted above, most of the debate during this rulemaking proceeding was spurred by the Board's proposal to amend the rules to require unlicensed individuals to register and complete eight credits of continuing education a year as a condition of renewal of their registration. Two interrelated provisions of the proposed rules address this requirement: parts 3800.3525 and 3800.3602.

58. Proposed rule part 3800.3525 provides:

3800.3525 REGISTRATION OF UNLICENSED INDIVIDUAL

Subpart 1. **Unlicensed individual registration requirement.** Individuals who are 17 years of age or older, who do not hold any class of electrical license issued by the department, and who perform electrical work required to be performed by employees of a contractor or employer as defined in part 3800.3550, subpart 6, must be registered with the department.

Subp. 2. **Information required on initial registration application.** Applicants for registration must provide the following information on the initial application form provided by the department:

- A. full name;
- B. date of birth;
- C. Social Security number;
- D. home address;
- E. *a different designated address to become public information, if the applicant wishes the home address to remain private;*
- F. area code and telephone number, if it exists;
- G. e-mail address, if any;
- H. date of application;

- I. class of work being performed; and
- J. name, address, and telephone number of employer.

Subp. 3. **Duty to keep information current.** All of the information required by subpart 2 must be kept current. Registered individuals must notify the department within 30 days of any changes in the required information.

Subp. 4. **Information required to be provided by applicant for registration renewal application.** Applicants for registration renewal must provide the following information on the renewal application provided by the department:

- A. verification of employment by a licensed contractor or employer as defined in part 3800.3550, subpart 6, that includes the following:
 - (1) names of employers during the previous 12-month registration term;
 - (2) address of each employer;
 - (3) telephone number of each employer;
 - (4) dates of employment with each employer; and
 - (5) class of work performed for each employer; and
- B. any changes to the information required in subpart 2, items, A, B, D, E, and F.

Subp. 5. **Continuing education required.** Registered unlicensed individuals must earn eight hours of continuing education credit as a condition of renewal of their registration. Registrants who do not renew the registration prior to 12 months after expiration must submit an initial registration application in accordance with subpart 2.

Subp. 6. **Registration card.** The unlicensed individual must always carry the registration card issued by the department when performing electrical work and must present it to department representatives or electrical inspection authorities upon request.⁷⁵

59. After the hearing, the Board modified part 3800.3525 of the proposed rules by adding the italicized language set forth in subpart 2, item E above. This modification was made in response to residential privacy concerns expressed by Anthony Mendoza on behalf of the Minnesota Cable Communications Association. In its post-hearing submission, the MCCA noted that it approved of this modification of the proposed rules.⁷⁶ The modification is needed and reasonable to allow registrants the

⁷⁵ See also Public Ex. 3 (Registration Application).

⁷⁶ MCCA Comment (March 9, 2009) at 1.

option of protecting the confidentiality of their residential addresses, and does not result in a rule that is substantially different from the rule as originally proposed.

60. Greg McDonald, President of Automatic Irrigation Inc., questioned why the Board was requiring a social security number for registration when it does not require an applicant for licensure to include one.⁷⁷ The Board did not respond to this concern in its post-hearing comments. Although the request for inclusion of a social security number on the registration form does not constitute a defect in the proposed rules, the Board may, if it wishes, consider modifying this provision of the rules in response to the comment. Any such modification would not constitute a substantial change.

61. Proposed rule part 3800.3602, subp. 4, specifies:

The department shall not renew the registration of a registered unlicensed individual unless the applicant received credit for eight hours of instruction through one or more educational programs as required by this part. Credit for an educational program may only be used once for renewal of registration. At least two hours of instruction must be on the NEC with the remainder on the statutes and rules governing electrical installations, this chapter, chapter 3801, Minnesota Statutes, sections 326B.31 to 326B.399, or technical topics related to electrical installations and equipment.

62. A number of individuals and organizations expressed support for the continuing education requirement set forth in the proposed rules. William Majerle, Director for the Iron Range and Duluth Electrical Joint Apprenticeship and Training Center, stated that his organization, which employs approximately ninety apprentices and expends more than \$300,000 in training annually, supported the continuing education requirement for unlicensed persons and asserted that all electrical workers on a job site should receive equal training to ensure the safety of the industry and its employees.⁷⁸ The Minnesota Electrical Association, Inc. (MEA), which represents more than 400 licensed electrical contractors, indicated in its testimony and written submissions that it supports the proposed rules because they would promote better training for workers and improve safety in the workplace. The MEA specifically supported the continuing education requirement for unlicensed individuals.⁷⁹ In addition, the International Brotherhood of Electrical Workers (IBEW) Local Union 292 indicated that it supported the proposed rules, including the continuing education requirement for unlicensed individuals, because training on the hazards of electricity and compliance with the NEC is necessary to prevent electrocution. Local 292 asserted that the proposed rules will increase safety for electrical workers and the general public.⁸⁰

⁷⁷ Comment, March 2, 2009.

⁷⁸ Comment, Feb. 24, 2009; see also Stephen Weber, CEO of Weber Electric, Inc., Comment, March 9, 2009 (stating same); Jim Nimlos, Director, Minneapolis Electrical Joint Apprenticeship and Training Committee, Comment, March 9, 2009 (stating same); Cal Turner, Vice-President of API Electric, Comment, March 11, 2009 (stating same).

⁷⁹ Testimony of Gary Thaden, Tr. 27-28; Comment (John Ploetz), March 6, 2009.

⁸⁰ Testimony of Dan McConnell, Tr. 29; Comment, March 9, 2009 (Tony Maghrak).

63. Numerous individuals and groups expressed opposition to the portion of the proposed rules requiring continuing education for registered unlicensed persons. They asserted that the Board lacks statutory authority to require continuing education for such individuals and argued that the Board had not shown that the proposed rules were needed and reasonable. These concerns are discussed in greater detail below.

Statutory Authority

64. A number of those commenting on the proposed rules argued that the Board does not have the legal authority to promulgate a rule requiring continuing education for registered unlicensed persons.⁸¹ For example, the Minnesota Telecom Alliance asserted that there is no statutory support for the continuing education requirement.⁸² In addition, the Minnesota Electronic Security and Technology Association (MNESTA) and the Satellite Broadcasting and Communications Association of America (SBCAA) argued that the Board's statutory authority to promulgate rules on continuing education is limited to requiring continuing education for *licensed* individuals. SBCAA contended that the Legislature did not intend to extend continuing education requirements to registered unlicensed individuals and indicated that such individuals may only perform limited tasks and are closely supervised by licensed individuals. MNESTA and Leigh Johnson of Custom Alarm/Custom Communications, Inc., noted that a registered unlicensed individual who fails to meet the continuing education requirement will not have his or her registration renewed by the Board under the proposed rules and asserted that, as a result, the employer would have no choice but to terminate the individual. They argued that this would cause potentially burdensome unemployment issues and amounts to a "de facto licensure" of registered unlicensed individuals. MNESTA contends that "[o]nly regulation by licensure can bar employment to an individual because he or she fails to meet continuing education requirements," and argues that the proposed rules exceed the Board's statutory authority because the Legislature did not intend or authorize the Board to enact employment barriers for individuals who are not required to be licensed. MNESTA suggested that the language of the proposed rule be revised to require that unlicensed individuals working in the technology and electrical industries register annually with the Department, and specify that only individuals who wish to establish experience credit toward licensure would need to take required continuing education classes annually. Under the MNESTA proposal, the consequence for failure to obtain eight hours of continuing education annually would simply be losing credit for experience. Individuals who do not seek to establish experience toward licensure would not be required to take continuing education classes as a requirement for registration.⁸³

65. The Board responded that Minn. Stat. § 326B.32, subd. 2(a)(6), grants it specific authority to promulgate rules requiring continuing education for registered unlicensed persons. That statute specifies that the Board has the power to "adopt rules that regulate continuing education for individuals licensed *or registered* as electrical businesses, electrical contractors, master electricians, journeymen electricians, Class A installer, Class B installer, power limited technicians and other persons who perform electrical work. . . ."⁸⁴ The Board emphasized that unlicensed individuals are the only

⁸¹ See e.g., Tr. 137.

⁸² Testimony of Richard Keane, Tr. 30-35; Public Ex. 1.

⁸³ Public Exs. 5, 6; Tr. 86-91; Comment, March 9, 2009.

⁸⁴ Emphasis added.

persons required to register under the Electrical Act or the rules. Accordingly, when the Legislature included the words “or registered,” the Board argued that it must have been referring to registered unlicensed persons. Accordingly, the Board asserted that it has the requisite statutory authority to promulgate rules requiring continuing education for registered unlicensed persons.⁸⁵

66. The Administrative Law Judge concludes that the Board has statutory authority under Minn. Stat. § 326B.32, subd. 2(a)(6), to adopt rules regarding the registration of unlicensed individuals and continuing education requirements applicable to registered unlicensed persons. The proposed rules do not require employers to terminate individuals who fail to renew their registration; in fact, there is nothing in the proposed rules that would preclude an employer from redefining the scope of the individual’s duties and retaining him or her as an employee. The Board’s proposal to broadly define the unlicensed individuals who must register to include those who “perform electrical work required to be performed by employees of a contractor or employer” is consistent with the Legislature’s directive that “unlicensed individuals performing electrical work for a contractor or employer shall register with the department in the manner prescribed” The Board’s decision to deny registration renewal to those registered unlicensed individuals who fail to obtain eight hours of continuing education is a reasonable approach that can be taken to ensure that registered persons have an incentive to comply with the continuing education requirement. While it is within the Board’s discretion to choose another approach, such as the one urged by MNESTA, the proposed rules are not rendered defective by their failure to specify a different approach. An agency is legally entitled to make choices between possible approaches so long as its choice is rational.⁸⁶

Need for and Reasonableness of Continuing Education Requirement

67. Many individuals and organizations opposing the proposed rules argued that the Board failed to demonstrate that the proposed continuing education requirement is needed and reasonable. Jack MacKenzie, superintendent of the North Oaks Golf Course, stated that the rule is not needed to address any safety issues and that the requirement will not benefit the industry or the public in general.⁸⁷ Ron Soukup, owner of a small landscape irrigation business in northern Minnesota, also stated there was no public safety issue and noted that there had not been a single incident involving injury or damage caused by improper work performed by an unlicensed worker during his company’s 25 years of operation.⁸⁸ William Braun, President of the Communication, Control, Alarm, Remote, Signaling Association, asserted that the proposed rule is unnecessary and emphasized that current law mandates that work on high voltage and technology circuits be performed under the direct supervision of a licensed person.⁸⁹ The Minnesota Cable Communications Association (MCCA) also contended that the Board failed to establish the need for imposing a continuing education requirement.⁹⁰ MNESTA argued that many unlicensed individuals working in the electrical and technology industries will not remain in those fields. It indicated that some are seasonal

⁸⁵ Board Comment, March 9, 2009 at 10-11.

⁸⁶ See, e.g., *Federal Sec. Adm’r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

⁸⁷ MacKenzie Test., Tr. 139-141; Comment, March 9, 2009 (submitted by Thomas Radio).

⁸⁸ Soukup Test., Tr. 113-123; Comment, March 9, 2009 (submitted by Thomas Radio).

⁸⁹ Comment, March 9, 2009, *citing* Minn. Stat. §§ 326B.33, subd. 12 and 21.

⁹⁰ Comment, March 9, 2009 (Anthony Mendoza) at 2-3.

college or high school students, and others are working as laborers until they can find a job in another industry. MNESTA asserted that the proposed rules do not properly identify those individuals who should be tracked for experience requirements, and therefore the rules are unreasonable and unnecessary.⁹¹

68. In the SONAR, the Board provided the following explanation of the reasons for the continuing education portion of the rule:

Requiring registered unlicensed individuals to acquire a minimum of eight hours of continuing education will ensure that they are provided with basic electrical theory and code training and will subsequently result in installations being completed in compliance with required safety standards. Most technology circuit and system work is allowed to be performed by registered unlicensed individuals who are only provided with general supervision and not direct supervision by individuals licensed to perform electrical work. In these instances, it is necessary for registered unlicensed individuals to have electrical theory and code knowledge so that their work complies with applicable safety standards. Requiring continuing education for registered unlicensed individuals increases the base knowledge of individuals performing electrical work and also updates their knowledge as codes are updated.⁹²

As further evidence of the need for the proposed rule, the SONAR noted that “[r]egistered unlicensed individuals who take license examinations across all license classifications pass these examinations at a rate of less than 50%. The examinations are based on basic electrical theory and code knowledge that is commensurate with the scope of work allowed by the license which the applicants are seeking.”⁹³

69. Assistant Department Director John Schultz testified at the rule hearing and also submitted written comments about three enforcement actions taken by the Department and Board: (1) an enforcement action that included an audit conducted by the Department in January and February of 2009 relating to the work of one satellite antenna system installer; (2) a 2006 enforcement action in which a company was required to make corrections to 6,700 satellite antenna installations; and (3) a 2003 or 2004 enforcement action relating to the State Lottery’s antenna equipment, in which 2,500 to 3,000 of the installations required corrections. All of these enforcement actions involved different companies.⁹⁴

70. The Board indicated that the purpose of the 2009 audit was to verify compliance with applicable NEC requirements. Of the 147 installations audited, 97 or 66% had significant Code violations. The installations that were audited were selected from a list of over 3000 installations provided by the contractor. According to the Board, individuals who perform antenna system wiring are not required to be individually licensed, but they are required to be employees of a licensed contractor and to be

⁹¹ Public Ex. 5; Testimony of Russ Ernst, Tr. 86-91. See also Comment of David Fisch, President of Security Engineering Associates, Inc., March 5, 2009 (stating many individuals working in the alarm industry are hired on a part-time basis and virtually none of them pursue careers in the alarm industry).

⁹² SONAR at 10; Board Rebuttal Comment, March 16, 2009 at 1.

⁹³ SONAR at 10. Board Rebuttal Comment, March 16, 2009 at 1.

⁹⁴ Board Rebuttal Comment, March 16, 2009, citing Schultz Test., Tr. 22, 73-74; Ex. 25.

registered if they are not individually licensed. The Board believes that most, if not all, of the work audited was performed by unlicensed individuals. In the Board's view, the high percentage of Code violations found in this audit demonstrates that individuals performing the installations have limited understanding of Code requirements. The Board indicated that requiring continuing education for these individuals will ensure that they have adequate knowledge and understanding of the NEC and other requirements.⁹⁵

71. During the hearing and in its post-hearing submissions, the Board reiterated that the purpose of the continuing education requirement was to promote compliance with safety standards, and noted that the SONAR had emphasized that point. The Board also stressed that the license examination failure rate provides evidence that there is a problem with the knowledge base of registered unlicensed persons. The Board asserted that the low passage rate among registered persons seeking *any* type of license (not just the power limited technician license) demonstrates that the problem with the knowledge base of registered unlicensed persons is not limited to a single portion of the industry. The Board argued that "[i]t is therefore reasonable to conclude that a great proportion of registered unlicensed individuals, across all license classifications, lack the knowledge needed to comply with safety standards for electrical installations."⁹⁶

72. MCCA and MNLA objected to consideration of the Board's 2009 audit because it was conducted after the SONAR was drafted and the rules were proposed. MCCA argued that the Board should not have initiated this rulemaking proceeding until it had established the circumstances justifying the rule. By waiting until the hearing to submit the audit into the record, MCCA asserted that the Board had unfairly limited the public's opportunity to review and respond to the information.⁹⁷ MCAA asserted that, even if the audit were considered, it did not establish the need for the continuing education requirement but merely demonstrates a need for additional enforcement of the current regulations. MCAA argued that the Board has ample enforcement remedies available to specifically address license holders whose employees violate the electrical code and contended that it is unnecessary to adopt new industry-wide standards when the current standards are not enforced.⁹⁸

73. In its response, the Board asserted that the audit results are credible and are properly part of the record in this rulemaking proceeding. It denied that the audit was performed in response to prehearing comments alleging an absence of evidentiary support for the proposed rule. Rather, the Board indicated that the audit was conducted as part of an enforcement action pursuant to an Administrative Order issued to DirectSAT on October 10, 2008, approximately ten weeks before publication of the Notice of Intent to Adopt Rules.⁹⁹ The investigation that resulted in issuance of the Administrative Order was prompted by a public complaint. The Order assessed a \$10,000 penalty and required corrective action. Mr. Schultz indicated that he presented

⁹⁵ See Board Ex. 25; Schultz Test., Tr. 21-24, 74.

⁹⁶ Board Rebuttal Comment, March 16, 2009 at 2; see *also* Schultz Test., Tr. 24-25.

⁹⁷ MCCA Comment, March 9, 2009 (Anthony Mendoza) at 5-6; MNLA Comment, March 9, 2009 (Thomas Radio) at 8 (stating January 2009 audit should not be considered because it was performed after the SONAR was published, in violation of Minn. R. 1400.2070).

⁹⁸ Comment, March 9, 2009 (Anthony Mendoza) at 6-7.

⁹⁹ Board Rebuttal Comment, March 16, 2009 at 3-4, Attachment 1.

information about the 2009 audit because it was the most current evidence available at the time of the rulemaking hearing.¹⁰⁰

74. The Administrative Law Judge finds that it is proper to consider the audit information submitted by the Board as part of the record of the rulemaking proceeding. The record in a rulemaking proceeding includes all of the information submitted at and after the hearing until the close of the record. The rulemaking record consists of the jurisdictional documents submitted by the agency; all written materials submitted by participants; a tape recording of the hearing, or a transcript if one has been prepared; all exhibits or other items of physical evidence; and the report of the Administrative Law Judge.¹⁰¹ The Administrative Procedure Act contemplates that the agency shall make an affirmative presentation of facts at the public hearing establishing the need for and reasonableness of the proposed rules¹⁰² and shall submit the SONAR and “any written exhibits in support of the proposed rule” into the record and present “additional oral evidence.”¹⁰³ The rules adopted by the Office of Administrative Hearings state that the SONAR must “summarize the evidence and argument that the agency is relying on to justify both the need for and the reasonableness of the proposed rules,” “state how the evidence rationally relates to the choice of action taken,” and “explain the circumstances that created the need for the rulemaking and why the proposed rulemaking is a reasonable solution for meeting the need.” The OAH rules further state that the SONAR “must be sufficiently specific so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the proposed rules.” However, the SONAR “need not contain evidence and argument in rebuttal of evidence and argument presented by the public.”¹⁰⁴

75. While the statute and rules express a preference for the inclusion of supporting evidence and argument in the SONAR where reasonably possible, the agency is not precluded from supplementing the information contained in its SONAR during the hearing and in its post-hearing submissions. In this instance, the audit information was compiled after the SONAR was issued. The information was highlighted and discussed during the hearing, and was posted on the Board of Electricity’s website immediately following the hearing. Members of the public had ample opportunity to review, make inquiries, and respond to the audit information.

76. MNLA and MCAA asserted that the audit did not support the need for or reasonableness of the Board’s decision to apply the proposed continuing education rule to all registered unlicensed individuals. MCAA contended that the hearing testimony confirmed that other businesses working with low-voltage power adequately train their workers to comply with the Code¹⁰⁵ and maintained that there is no evidence demonstrating that industries other than the satellite industry lack a base level of technical knowledge.¹⁰⁶ MCAA thus argued that the record provided no basis for a new continuing education requirement applicable to businesses and individuals with no

¹⁰⁰ Board Rebuttal Comment, March 16, 2009 at 3.

¹⁰¹ G. Beck, *Minnesota Administrative Procedure*, 2nd ed. (1998), § 20.4.3 at 328.

¹⁰² Minn. Stat. § 14.14, subd. 2.

¹⁰³ Minn. Stat. § 1414, subd. 2a.

¹⁰⁴ Minn. R. 1400.2070, subp. 1.

¹⁰⁵ Comment, March 9, 2009 (Anthony Mendoza) at 7, citing Keane Test., Tr. 31, and Edgett Test., Tr. 80-82.

¹⁰⁶ Comment, March 9, 2009 (Anthony Mendoza) at 7, citing Freichels Test. at 7.

record of Code violations or lack of training, and that the proposed rule is unnecessary and unreasonable in its application to them.¹⁰⁷ MNLA asserted that the instances of inadequate grounding of satellite dish antennas cited in the audit appeared to be limited to one installer, or at most, a narrow field of the industry, and stated that there is no evidence that the improper installation caused any injury. MNLA pointed out that the Board offered no showing of safety problems with other parts of the low-voltage industry, including the landscape lighting and irrigation industry. MNLA argues that the Board has not demonstrated the need for an industry-wide education requirement and the rule is therefore overbroad because it requires all unlicensed individuals to attend education courses.¹⁰⁸ MNLA also argued that the Board's distinction between direct and general supervision does not support a need for the proposed rule. MNLA contended that the legislative determination that direct supervision is not required reflects the Legislature's judgment that this is not work that causes unsafe conditions and supports the notion that additional education requirements are also not required. MNLA asserts that the proposed rule circumvents that legislative judgment by requiring education for unlicensed workers.¹⁰⁹

77. Several organizations and individuals opposing the proposed rule stated that the continuing education requirement is unreasonable for a variety of other reasons as well. For example, Richard Keane, on behalf of the Minnesota Telecom Alliance (MTA), noted that recent statutory changes have doubled the continuing education hours necessary to renew the Power Limited Technician license and questioned the reasonableness of imposing education costs on registered unlicensed individuals that are comparable to those required of Power Limited Technicians. MTA stated that there was no evidence that the registration or continuing education requirements would improve the quality or safety of technology system wiring or installations and asserted that most technology installations do not expose persons or property to the hazards that exist with high voltage electrical light and power installations.¹¹⁰ MNLA, MNESTA, and Bruce Zeman expressed concern that the continuing education requirement might mislead unlicensed individuals into believing they have more knowledge, ability and authority than they do.¹¹¹ MNLA argued that the requirement in the proposed rule that two of the eight hours focus on NEC requirements is unreasonable. MNLA stated that the Board's assertion that two hours would be sufficient to provide unlicensed workers with an understanding of the changes in the context of the entire code reflected an unrealistic understanding of the complexity and scope of the NEC.¹¹²

78. In its post-hearing submissions, the Board noted that individuals holding electrical licenses are required to earn 16 hours of continuing education instruction every two years and asserted that it is reasonable to require unlicensed individuals registered for a one-year period to obtain eight hours of continuing education.¹¹³ Because individuals seeking licensure must gain experience performing electrical work

¹⁰⁷ Comment, March 9, 2009 (Anthony Mendoza) at 7; see also Bruce Zeman Comment, received March 1, 2009 (stating that the satellite industry violations cited in the audit are not indicative of the electrical industry in general).

¹⁰⁸ Comment, March 9, 2009 (Thomas Radio) at 7-8.

¹⁰⁹ MNLA Rebuttal Comment, March 16, 2009 at 3.

¹¹⁰ Testimony of Richard Keane, Tr. 30-35; Public Ex. 1.

¹¹¹ Comment, received March 1, 2009 (Bruce Zeman); MNLA Comment, March 9, 2009 (Thomas Radio) at 8-9, 11; MNESTA Comment, March 9, 2009 (Russ Ernst); Public Ex. 5.

¹¹² Rebuttal Comment, March 16, 2009.

¹¹³ Board Comment, March 9, 2009 at 4.

to qualify for the license and therefore will be performing electrical work as a registered unlicensed individual for multiple years, the Board argued that it is reasonable to require them to obtain continuing education credit.¹¹⁴

79. The Board also stated that, in its view, it would not be legal or reasonable to exempt certain unlicensed individuals from the continuing education requirements in the proposed rule or create different classifications of registration. The Board indicated that the Legislature has created only one type of registration for all unlicensed workers and, as a result, the Board believes that the requirements for renewal of registration must be uniform across all types of unlicensed electrical workers. Because registered unlicensed individuals are not restricted in the type of electrical work they perform, the Board asserted that it is reasonable that the continuing education requirements be the same for all registered unlicensed individuals. The Board does not believe that it has the authority to create sub-classifications of registered unlicensed individuals or limit the type of work that a registered unlicensed individual can perform within the supervision requirements of the statute. In the Board's view, only the Legislature can create subcategories of registered unlicensed individuals.¹¹⁵

80. In response to those who argued that the continuing education requirement will cause the unlicensed individuals to think they can perform work that they are not qualified to perform, the Board stated that a portion of the proposed continuing education requirement would be spent on electrical laws or technical topics, which includes education about who is or is not qualified to perform different types of electrical work. The Board argued that persons who receive this education should be better informed about which individuals can perform which types of electrical work.¹¹⁶

81. The Board also contended that it is reasonable to require that two hours of the continuing education pertain to NEC requirements. The current rule regarding continuing education for Power Limited Technician licensure requires that 25 percent of the education pertain to the NEC. For other licenses, 75 percent of the continuing education must relate to NEC requirements. Accordingly, the Board asserted that it is reasonable to require 25 percent of continuing education units for registered unlicensed individuals to be on the NEC. The Board indicated that the NEC is amended every three years and its provisions pertaining to low voltage work have recently changed. The 2008 amendments to the NEC added a new section that affects technology circuits and systems work. The Board maintained that it is important for individuals who perform technology circuits and systems work to be aware of the code changes that occur on a regular basis.¹¹⁷

82. In its post-hearing submissions, the Board asserted that the need for continuing education exists because the Department has found significant, repeated problems with work performed by unlicensed individuals. The Board contended that the

¹¹⁴ Board Comment, March 9, 2009 at 6. For example, an applicant for a journeyman electrician license must have either three or four years of experience performing electrical work to qualify for the license, and an applicant for a Power Limited Technician license must have two or three years of experience in electrical work (or be a graduate of a four-year electrical course) before qualifying for the license.

¹¹⁵ Board Comment, March 9, 2009 at 6; Board Rebuttal Comment, March 16, 2009 at 5; Schultz Test., Tr. 60.

¹¹⁶ Board Comment, March 9, 2009 at 4-5.

¹¹⁷ Board Comment, March 9, 2009 at 5, citing proposed rule 3800.3602, subp. 4.

problems documented in the Department's audit of the satellite industry pose a threat to public safety, such as the increased risk of fire during a lightning strike where satellite antennas are not properly grounded. In other instances, the Department asserted that the fire-resistance of buildings has been compromised by the improper installation of technology circuits and systems wiring. The Board maintains that continuing education for unlicensed persons is needed to reduce the likelihood of improper work by registered unlicensed individuals. The Board indicated that a rule requiring continuing education for unlicensed registered persons is needed because it will ensure that individuals performing electrical work have the knowledge necessary to properly perform that work. The Board emphasized the value of educating individuals who perform any electrical work, regardless of the type of electrical work they perform. The Board and the Department asserted that many individuals spend their entire careers performing electrical work for an employer in a position which does not require a license. Because individuals can and do spend many years performing unlicensed electrical work, they contended that it is reasonable to require those individuals to obtain continuing education. The Board further asserted that only registered unlicensed individuals performing the most dangerous types of electrical work (high voltage work for which a license is required) are subject to the requirement of direct supervision; for other registered unlicensed individuals performing electrical work, there is merely a general supervision requirement. Because not all electrical work is required to be performed under the direct supervision of a licensed individual, the Board believes that unlicensed individuals should be required to have the same or similar continuing education as license holders.¹¹⁸

83. The Board asserted that the problem of defective work occurs when unlicensed individuals perform work under general supervision and that work is not inspected by the Department or municipality. Most low voltage work falls into that category, including work in the satellite installation field and the landscaping and irrigation industries. Moreover, the Board indicated that failure rates on licensing examinations suggest that the inadequate knowledge base is not confined to workers in the low voltage area. The Board indicated that enforcement actions have focused on the low voltage area because high voltage work requires an inspection. If the inspector finds a problem, it is corrected before the installation is put into operation, and generally the Department takes no additional enforcement action.¹¹⁹

84. Many of those commenting on the proposed rules expressed concern about the reasonableness of the costs that employers would incur in connection with the continuing education requirement. Jack MacKenzie, superintendent of the North Oaks Golf Course, stated that his golf course employs 27 seasonal employees. He indicated that he will not be able to employ that same number of staff if the new rules are implemented because of the documentation costs, program fees the Golf Course would reimburse to its employees, and lost wages associated with employee attendance at training sessions.¹²⁰ Joel VonHaden, owner of a small business that employs Technology System Technicians and unlicensed individuals, opposed the training requirement because it will increase costs to employers and lower employee

¹¹⁸ Board Comment, March 9, 2009 at 2-4, citing Ex. 25 and Minn. Stat. § 326B.33, subd. 12(a); Department Comment, March 9, 2009 at 1; . Testimony of John Schultz, Tr. 19-20.

¹¹⁹ Board Rebuttal Comment, March 16, 2009 at 5; Department Rebuttal Comment, March 16, 2009; Schultz Test., at 20; Ex. 27.

¹²⁰ Comment, March 9, 2009 (submitted by Thomas Radio).

productivity.¹²¹ Ron Soukup, owner of a small landscape irrigation business in northern Minnesota, also opposed the cost of the proposed continuing education requirement. He employs five full-time employees and eleven seasonal employees. Although the current license fees required for his business are minimal (\$490), he asserted that there is little training available outside the metropolitan area and contended that the total cost of maintaining the licenses (\$3,200) is more substantial after taking into consideration the lost hours of productivity, travel time and a hotel stay. He expressed concern that these costs will increase as a result of the new continuing education requirement.¹²²

85. Leigh Johnson, CEO of an alarm company in Rochester, Minnesota, stated that he employs part-time employees, most of whom will seek licensure or make a career in the electrical industry. Mr. Johnson asserted that it is unreasonable to require the alarm industry to send its part-time or transient employees to eight hours of annual training, especially because the alarm industry does not operate an industry apprenticeship program. Mr. Johnson estimated that his company spent more than \$25,000 to comply with Power Limited Technician license requirements in 2008.¹²³ Bruce Zeman disputed the Department's estimates that continuing education courses cost on average \$50 for an eight-hour course and that the maximum cost for an eight-hour course was \$150. He stated that he has never been offered eight hours of training for \$50, and that, in his experience, an eight hour course costs \$189.¹²⁴

86. MNLA emphasized that the Board estimates that the total cost to employers could be as much as \$10,000 when hourly wages are included in the calculation, and asserted that, for some of its members, \$10,000 could represent their annual net profit. MNLA argued that it is bad economic policy to require small employers to incur substantial educational costs when there is no showing that such education will result in a safer work environment.¹²⁵ MCCA stated that, "For Comcast alone, the cost of attending eight hours of state-mandated training would run approximately \$260,000 per year, including eight hours of lost productivity to attend the . . . training course."¹²⁶

87. The Board responded that those filing comments in opposition to the proposed rule have grossly exaggerated the cost of complying with the rule. As noted above, the Board estimated in the SONAR that, if a small business or city chose to pay for continuing education costs for all 50 employees, at a wage of \$200 for eight hours, the maximum wage cost to an employer would be \$10,000. Most small businesses, however, do not employ 50 employees. Based on the \$200 estimate, if a small business decided to pay for the continuing education of five employees who wanted to renew their registration, the cost in lost wages would not exceed \$1,000.¹²⁷

88. Regarding the need for seasonal employees to obtain continuing education, the Board asserted that not all seasonal employees are required to perform electrical work, which is a small part of the landscape industry. If the employer has little

¹²¹ Comment, March 6, 2009.

¹²² Comment, March 9, 2009 (submitted by Thomas Radio).

¹²³ Comment, March 9, 2009.

¹²⁴ Comment, received March 1, 2009.

¹²⁵ Comment, March 9, 2009 (Thomas Radio) at 7-8, citing SONAR at 6.

¹²⁶ Ex. 22 at 8 (Comments and Request for Hearing).

¹²⁷ Board Rebuttal Comment, March 16, 2009 at 7-8.

electrical work, the employer need not ensure that every employee is trained and registered to perform that work. The employer could be selective to avoid the need for multiple employees to register and obtain continuing education credit. Moreover, the Board pointed out that some of the seasonal employees might be new registrants who would not need continuing education until they decided to renew their registration.¹²⁸

89. The Board also asserted that some of the existing training provided by a business could be incorporated into the continuing education requirement. Many of those commenting on the proposed rule stated that they already provide training to their employees. The Board emphasized that the current continuing education rules allow an employer to become a continuing education provider. The Board indicated that the required classifications for obtaining approval of training instructors are not onerous, and projected that the cost of employers having their in-house training certified for continuing education credit would be small. The Board stated that the proposed amendment to rule part 3800.3603, subp. 5, would make it easier for an employer's in-house employees to qualify as instructors of continuing education. The Board indicated that one employee must be a licensed power limited technician, who would qualify as an instructor to provide the continuing education. The Board estimated that the costs to a business that prepares its own materials and provides its own training would not exceed \$50 a student. The Board indicated that the cost to the Department is less than \$50 per student, including the Department's staff time, when the Department hosts eight-hour continuing education seminars.¹²⁹ The Board emphasized that the employer could avoid all costs by choosing not to provide the continuing education in-house, and simply leaving it up to the unlicensed registered person to be responsible for obtaining the credits. In the alternative, the employer could send the employee to the Department's continuing education course, at a cost of \$50 per student for eight hours of continuing education.

90. The Administrative Law Judge concludes that the Board has adequately demonstrated that the proposed continuing education requirement is both needed and reasonable. The Board's determination that all registered unlicensed individuals should obtain continuing education as a condition of renewal of their registration is rationally related to the public safety goals inherent in the Electrical Act and is a permissible and reasonable approach to increase the knowledge of unlicensed individuals and reduce the likelihood that they will perform improper work. The requirement that two of the eight hours of continuing education pertain to the NEC is needed and reasonable to further unlicensed individuals' understanding of the Code and ensure that they are aware of relevant Code revisions. The proposed rule is not rendered unreasonable by virtue of the costs associated with compliance.

Compliance and Enforcement Issues

91. Several people commented at the hearing that the Department's enforcement of license requirements is inadequate and that there is widespread disregard of the licensing rules among the electrical industry. They maintained that the

¹²⁸ Board Comment, March 9, 2009 at 8-9; Board Rebuttal Comment, March 16, 2009 at 8.

¹²⁹ Board Comment, March 9, 2009 at 7; Board Rebuttal Comment, March 16, 2009 at 7-8; Department Rebuttal Comment, March 16, 2009 at 3.

individuals who comply with the rules find themselves at a disadvantage compared to those who do not maintain the proper licenses.¹³⁰

92. Jeff Latterell, a Certified Irrigation Professional and Power Limited Technician, estimated that less than 45% of those who conduct irrigation or low voltage lighting in Minnesota are properly licensed. He stated that there is a high level of disregard for the Power Limited Technician and Technology System Contractor licenses because of the Department and Board have not enforced the licensing rules. He stated that the imposition of a requirement to register unlicensed workers and require them to complete continuing education will have no effect on the individuals who do not comply with the regulations, but it will increase the hardship on those who comply with the law.¹³¹ Ron Soukup estimated that approximately only 50% of landscape irrigation companies comply with the licensing requirements and are licensed Technology System Contractors. He suggested the Board enforce the existing rules instead of placing another regulatory burden upon the companies and individuals who comply with the rules.¹³² Gerry De la Vega, owner of a low-voltage outdoor lighting distributorship, stated that the proposed rules would cause companies not to pursue, or abandon, the Power Limited Technician license. He suggested that the Board focus on increasing compliance and urged it to simplify, not complicate, the administrative requirements to qualify for and maintain the Power Limited Technician license.¹³³

93. William Braun, President of CCARSA, questioned whether the new requirement will be enforced fairly and consistently because companies and individuals that dodge current licensing requirements will continue to avoid compliance.¹³⁴ Greg McDonald, President of Automatic Irrigation, Inc., asserted that the Department and the Board have not enforced the licensing requirements and stated that his company cannot compete against companies that do not adhere to the licensing requirements.¹³⁵ Bruce Zeman, president of a landscape company in Pequot Lakes, stated that the Department's lack of enforcement of the licensing standards has diminished the value of being properly licensed.¹³⁶

94. In response, the Board asserted that the comments about lack of enforcement of licensing rules are irrelevant, speculative and incorrect. The Board emphasized that it has no authority over enforcement of the rules under the governing statute. Moreover, the Board contended that enforcement actions, which take place after a violation has occurred, are not a substitute for continuing education, which is aimed at preventing defective electrical work. The Board maintained that preventing defective electrical work is the best way to protect public safety and property. Moreover, it contended that enforcement alone, no matter how highly publicized, is not enough to prevent faulty electrical work, and noted that the Department's enforcement action against DirectSAT did not prevent the problems described in the audit.¹³⁷ The Department asserted that it investigates and takes disciplinary action against violators,

¹³⁰ See e.g., MNLA, Comment March 9, 2009 (Thomas Radio).

¹³¹ Comment, March 9, 2009 (submitted by Thomas Radio).

¹³² Comment, March 9, 2009 (submitted by Thomas Radio).

¹³³ Tr. 102-105.

¹³⁴ Comment, March 9, 2009.

¹³⁵ Comment, March 2, 2009.

¹³⁶ Comment, received March 1, 2009.

¹³⁷ Board Rebuttal Comment, March 16, 2009 at 5-6.

and stated that the Department and the previous Board have had three high-profile enforcement cases since 2003 which involved over 15,000 separate installations.¹³⁸

95. While the allegations about lack of enforcement and noncompliance with current rules are not directly relevant to the rules under consideration in this proceeding, the Administrative Law Judge urges the Board and the Department to investigate the concerns that were raised by members of the public and take appropriate action.

Class Availability

96. Greg McDonald and Bruce Zeman stated that it is difficult to find relevant continuing education courses. Mr. McDonald indicated that the Board-sponsored training is inadequate for the number of licensed individuals who require training and will fall far short for the number of registered individuals.¹³⁹

97. The Department responded that there are abundant resources for finding continuing education programs. It indicated that there are 82 entities listed on the Department's website that have had education programs approved for continuing education credit. The Department believes that the proposed requirement for continuing education for all individuals who perform electrical work can be accomplished in a reasonable and practical manner. The Department also emphasized that the current continuing education rules allow an employer to become a continuing education provider. The Department asserted that the proposed amendment to part 3800.3603, subp. 5, would make it easier for an employer's in-house employees to qualify as instructors of continuing education because the amendment would eliminate the portion of the current rule that restricts the number of course credits based on the class of license held by the instructor. The proposed amendment to subpart 5, item C, of the rule would eliminate the current language that limits to four hours the credit for courses taught by a technical subject expert who does not meet one of the other instructor qualification categories.¹⁴⁰

Modification of Proposed 3800.3603

98. Subpart 1 of proposed rule 3800.3603 (and the current rule) includes the possibility of approval of educational programs presented through electronic media. The rule as currently written, however, does not include the possibility that a registrant may be enrolled in such a program. The Board has therefore proposed that the last sentence of proposed rule 3800.3603, subp. 1 (lines 19.13 – 19.16) be modified as follows:

In addition to the requirements of parts 3800.3600 to 3800.3603, a program presented through electronic media that does not include real-time interaction between the presenter and the licensee or registrant must include an examination process that ensures a licensee or registrant has successfully completed the program.¹⁴¹

¹³⁸ Department Rebuttal Comment, March 16, 2009 at 2.

¹³⁹ Comment, March 2, 2009 (Greg McDonald); Comment, received March 1, 2009 (Bruce Zeman).

¹⁴⁰ Department Comment, March 9, 2009 at 4; Board Comment, March 9, 2009 at 8.

¹⁴¹ Board Comment, March 9, 2009 at 12.

99. Similarly, proposed and current rule 3800.3603, subp. 7, requires that a report of credits earned be provided to each licensee in attendance. The Board proposes to amend the language of that rule as well to make it clear that registrants may obtain credit for attending continuing education programs. As modified, the proposed rule (lines 21.1 to 21.11) would read as follows:

Subp. 7. **Report of credits earned.** Within 14 days after presentation of an educational program for credit under part 3800.3602, the provider shall provide a certificate of completion to each licensee or registrant in attendance and shall forward an attendance list and original attendance sign-in document to the ~~board~~ department on a form supplied by the ~~board~~ department, or in a format approved by the ~~board~~ department. Each certificate of completion and attendance list shall include the name of the provider, date and location of the presentation, educational program identification that was provided to the ~~board~~ department, hours of instruction or continuing education units, and the licensee's or registrant's name and license or registration number or the last four digits of the applicant's Social Security number. The attendance list must be typewritten and provide a summary of each attendee's hours for each course attended.

100. The Administrative Law Judge concludes that the proposed modifications to part 3800.3603, subps. 1 and 7, are needed and reasonable to clarify the applicability of the rule to registrants. The modifications do not render the rule substantially different from the rule as originally proposed.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Board gave proper notice of the hearing in this matter. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

1. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

2. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii).

3. The amendments to the proposed rules suggested by the Board after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

4. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

5. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules, as modified, be adopted.

Dated: April 15, 2009.

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Hearing Transcript Prepared by Angela D. Sauro, RPR, Court Reporter, Kirby A. Kennedy & Associates (one volume).